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No. 99-1178

IN THE
Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF AMICUS CURIAE, CENTER FOR INDIVIDUAL RIGHTS, IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the Center for Individual Rights (CIR) respectfully submits this brief amicus curiae in support of the Petitioner.[1] Written consent by all parties was granted by counsel for all parties and is being lodged with the Clerk of this Court.

The Center for Individual Rights is a public interest law firm. It was founded in 1989 and has litigated cases to pursue its goal of protecting individual liberty, broadly defined. In keeping with that philosophy, CIR has a strong interest in preventing the increasing hegemony of federal power, which it believes is a threat to individual liberty. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (Constitution created a federal government of enumerated powers "to ensure protection of our fundamental liberties," *quoting Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). To this end, CIR has been at the forefront of the efforts to provide meaningful limits to Congressional power under the Commerce Clause. Most recently, CIR represented one of the defendants, and its General Counsel argued on behalf of both defendants, in *United States v. Morrison*, 120 S. Ct. 1740 (2000).

As interpreted by federal agencies, the Clean Water Act regulation at issue in this case is

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Center for Individual Rights affirms that no counsel for any party in this case authored this brief in whole or in part; and, further, that no person or entity has made a monetary contribution for the preparation or submission of this brief.

extraordinarily broad and can be deemed constitutional only by a breathtakingly expansive interpretation of the Commerce Clause. CIR believes that this Court should carefully consider the consequences of adopting such an interpretation before doing so, and, accordingly, submits this amicus brief for the Court's consideration.

STATEMENT

The Solid Waste Agency of Northern Cook County (SWANCC), a consortium of 23 municipalities, is challenging the Army Corps of Engineers' assertion of jurisdiction over a balefill project pursuant to the Corps' "migratory bird rule," which was promulgated pursuant to the Clean Water Act.[2] That rule purports to authorize the Corps to regulate placement of fill or dredged material on any isolated, intrastate water that does or potentially could serve as a habitat for any of the billions of migratory birds in the United States.

The Corps' claim of jurisdiction has halted the cooperative efforts of 23 municipalities to dispose locally of the solid waste generated by their citizens. In effect, the Corps has attempted to transform what has traditionally been a matter of local land use control into a matter controlled by the federal government. The Corps bases its claim of jurisdiction on the Clean Water Act (CWA)

[2] A "balefill" is a landfill where baled, rather than loose, material is dumped. There is water on the part of the site that SWANCC intends to use as a balefill.

and the Commerce Clause, on which authority the CWA was enacted.

The government's interpretation of those powers in this case (as in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 120 S. Ct. 1740 (2000)) would arrogate enormous and virtually unlimited power to the federal government. Indeed, the "migratory bird rule" is so broad that it is difficult to imagine a public or private project that would not require the Corps' approval. The Court must police the boundaries of the enumerated powers in the Commerce Clause, Article I, Section 8. In this case, it would require finding that the Corps' interpretation of the CWA set forth in its "migratory bird rule" is not permitted under the Commerce Clause.

ARGUMENT

I. Statutory and Regulatory Scheme

The Clear Water Act of 1972 states that the "discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311. This rather broad proscription is qualified by (1) exceptions listed in other provisions of the Act which make it permissible to discharge a pollutant under circumstances not relevant here or with a permit granted by an agency of the federal government, and (2) the various definitions listed in 33 U.S.C. § 1362. Those definitions provide that a "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source" (33 U.S.C. § 1362(12)); a "pollutant" includes solid waste, sewage, garbage, heat, rock, sand, and cellar dirt (33 U.S.C. § 1362(6)); and

"navigable waters" means "the waters of the United States" (33 U.S.C. § 1362(7)).

That last definition is further elucidated by regulations issued by the Environmental Protection Agency ("EPA") and the Corps.[3] The Corps' regulations define "waters of the United States" in sweeping terms to mean:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate commerce or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (2) All interstate waters including interstate wetlands;
> (3) All other waters such as intrastate lakes, rivers, streams. . . wetlands, . . . prairie potholes, . . . playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

[3] The Corps' regulatory definition is set forth in 33 C.F.R. § 328.3(a); EPA's are set forth at 40 C.F.R. 230.3(s). *See* 51 Fed. Reg. 41206, 41216-17 (Nov. 13, 1986). For ease of discussion, further citations are provided only to the Corps' definition.

> (iii) Which are or could be used for industrial purpose by industries in interstate commerce;
> (4) All impoundments of waters otherwise defined as waters of the United States under this definition;
> (5) Tributaries of [the foregoing] . . . ;
> (6) The territorial seas;
> (7) Wetlands adjacent to [the foregoing]. . .

33 C.F.R. § 328.3.

The portion of the definition relevant here is paragraph (3), which defines the "waters of the United States" to include "[a]ll other waters . . . the use, degradation or destruction of which could affect interstate or foreign commerce . . ." The waters that fall within the scope of paragraph (3) are "intrastate and isolated waters" (*i.e.* "truly isolated water bodies" that have no connection to any tributary system that drains or flows into traditional navigable waters or interstate waterways). *See Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson*, § 3.c, at 3 (May 29, 1998).[4]

In the preamble to regulations promulgated in 1986, the Corps "clarified" that paragraph (3) waters (*i.e.* intrastate, isolated waters) also include waters:

[4] This joint EPA and Corps guidance is included in the Appendix hereto and is posted on the Corps' website at http://www.usace.army.mil/inet/functions/cw/cecwo/reg/wilson.

> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines . . .

51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). It is this so-called "migratory bird rule" – not really a rule, at least not one promulgated with notice and comment – that the petitioner challenges as a legally impermissible basis for federal jurisdiction.

Notably, in asserting jurisdiction under its "migratory bird rule," the Corps does not rely upon any of the other paragraphs in its definition of "waters of the United States." For example, the Corps does not assert that jurisdiction is premised upon the water bodies at the SWANCC site being "waters which are currently used, or were used in the past, or may be susceptible to use in interstate commerce or foreign commerce" (paragraph 1). Nor does it assert that such water bodies are interstate waters (paragraph 2) or wetlands adjacent to interstate waters (paragraph 7). Rather, the "migratory bird rule" purports to authorize the Corps to regulate placement of fill or dredged material on any intrastate, isolated water solely on the basis that it does or potentially could serve as a habitat for any of the billions of migratory birds in the United States.

The breath of this definition is sweeping. Under the Corps' interpretation, it has permitting authority over any intrastate, isolated water body even though such water body has never been

used in interstate commerce, is not being used in interstate commerce, and is not susceptible to being used in interstate commerce. In the Corps' view, it can assert jurisdiction over any local discharge of fill material into any water body if it serves, or potentially could serve, as a habitat for any migratory birds. Under the definition, tossing a rock into a birdbath (or a lake or pond) without a permit constitutes a violation of Section 1311. So would owning a heated pool that birds find attractive. In enacting the Clean Water Act, Congress could not have intended to regulate these types of activities under the rubric of regulating water pollution.

II. Challenging Rules under the Commerce Clause

Under the Court's current Commerce Clause jurisprudence, Congress can pass three kinds of statutes: it may regulate the channels of interstate commerce, it may regulate the instrumentalities of interstate commerce, or persons or things in commerce, and it may regulate intrastate activities having a substantial relation to interstate commerce, *i.e.* activities that substantially affect interstate commerce. *United States v. Morrison*, 120 S. Ct. 1740, 1749 (2000). Under the last branch of that jurisprudence, two features deserve emphasis. First, the trivial nature of the interstate commerce effects of one instance of the intrastate conduct being regulated is irrelevant, so long as the cumulative effects of all instances have a substantial effect on interstate commerce. Second, the Court has only permitted this theory to be used when the

conduct being regulated is economic in nature. *Id.* at 1751.

Any challenge to a statute that is defended as an exercise of Congress' authority under the third branch of Commerce Clause jurisprudence, the "substantial effects" branch, must be a facial challenge (since the trivial nature of the effects of individual instances is irrelevant). Since SWANCC is precluded from making an argument about the minimal effects of its own conduct, it must challenge the statute as a whole. In doing so, the question is whether the conduct being regulated by the statute as a whole is "economic" in nature. What SWANCC itself was planning to do is irrelevant, just as Alfonso Lopez's possession of a gun so that he could deliver it for $40 was irrelevant to the outcome in *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

III. The "Migratory Bird Rule" Presents Serious Constitutional Difficulties

The question of concern to CIR is whether Congress, under its Article I, § 8, power to regulate "Commerce among the states," has authority so sweeping in scope as to allow the Corps to regulate activities in intrastate, isolated water bodies under the Corps' "migratory bird rule." In focusing on the Commerce Clause implications of the Corps' "migratory bird rule," CIR takes no position on whether the "rule" is a reasonable interpretation of the term "navigable waters." Of course, if the Court finds that the

"rule" is not a proper interpretation of the CWA, it might not reach the Constitutional issue.

While the original statute, limited to truly navigable waters that are part of an interstate system or waterways used for travel, might have been constitutional as a regulation of the channels of interstate commerce (the first kind of Commerce Clause legislation), Section 1311 cannot be so defended as interpreted by the Corps and EPA. As interpreted, it regulates the "discharge" of a "pollutant" (*e.g.*, "fill material") into virtually any body of water in the United States. Given the interpretations of those terms by the agencies, the statute cannot reasonably be interpreted as regulating the channels of interstate commerce, and the lower courts and respondents have not tried to defend the statute on that ground. Rather, it has been defended solely as an exercise of Congress' authority to regulate intrastate activities having a "substantial effect" on interstate commerce. And, under the "substantial effect" test, the Corps' "migratory bird rule" cannot reasonably be defended.

In fact, at least one Circuit has ruled that the Corps' paragraph (3) definition of intrastate, isolated waters -- the rule that the "migratory bird rule" purports to clarify – is an impermissible exercise of Congress' authority under the third branch of Commerce Clause jurisprudence, the "substantial" effects" branch. The Fourth Circuit in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), has held invalid the Corps' paragraph (3) definition of intrastate, isolated waters because it exceeded the Corps' regulatory power under the

Clean Water Act. 133 F.3d at 257. The court noted that, had Congress enacted the paragraph (3) intrastate, isolated waters definition as a statute, "it would present serious constitutional difficulties . . . under the Commerce Clause," because it does not require that the regulated activity have a substantial effect on interstate commerce, nor that those waters have any nexus to interstate or navigable waters. *Ibid.* Because the paragraph (3) intrastate, isolated waters definition is not a statute, the court refused to presume that Congress had authorized that Corps "to assert its jurisdiction in such a sweeping and constitutionally troubling manner." *Ibid.*

Here, the conduct being regulated as a whole is primarily non-economic in nature. Even if people sometimes pollute for economic reasons (because it is easier than disposing of it in a costly fashion), that does not mean it is economic activity. People often murder for economic reasons, but murder is not "economic" activity subject to Congress' Commerce Clause power. Economic activity involves an exchange between two or more uncoerced parties. *See* Grant S. Nelson and Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa Law Rev. 1 (1999). The activity which is "discharging pollutants," including the throwing of rocks in a birdbath, is not economic activity.

Nor has there been a showing that the purported cumulative effect of balefilling on an intrastate, isolated water body would have a

substantial effect on migratory birds or on interstate commerce. Any arguable link between the regulation of isolated, intrastate water bodies and a purported substantial effect on interstate commerce is attenuated, at most.

If the theory of the Corps were adopted by the Court, it would give Congress the power to regulate virtually every aspect of land and water use throughout the United States. Taking down a bird feeder in one's backyard, and thus making it less hospitable to birds that travel in interstate commerce, would be an act subject to Congress' Commerce Clause authority. Growing a garden that could attract flying insects that travel across state lines (or harvesting and consuming the produce that migratory birds might consume in that garden) would be an act subject to Congress' Commerce Clause authority. And, swatting flies that travel in interstate Commerce would be within Congress' Commerce Clause authority.

The Court has recently held (in *Lopez* and *Morrison*) that Congress cannot regulate non-economic acts that have some effect on human beings' ability to travel in interstate commerce. It would be (to say the least) passing strange to suggest that Congress can regulate non-economic acts that have some long-range effect on the ability of birds or insects to travel in interstate commerce. So long as it is for the Courts, and not Congress or federal agencies, to determine the scope of the Commerce Clause Authority, the Court must reject assertions of that authority that would grant Congress virtually unlimited authority to regulate all aspects of our daily lives

and relegate the States to trivial and unimportant actors in the federal system.

Respectfully submitted,

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APPENDIX

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Washington, D.C. 20460

United States Department of the Army

U.S. Army Corps of Engineers
Washington, D.C. 20314

Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson

1. INTRODUCTION

a. On December 23, 1997, the U.S. Court of Appeals for the Fourth Circuit issued a decision in the case of United States v. Wilson, 133 F. 3d 251 (4th Cir. 1997). The decision resulted from an appeal from criminal convictions for discharging dredged and fill material into wetland areas subject to Clean Water Act (CWA) jurisdiction in Charles County, Maryland, by Mr. Wilson and two corporations, without obtaining the required CWA Section 404 permits. The Fourth Circuit overturned Mr. Wilson's criminal conviction because it identified legal errors in the jury instructions used in the case, as explained below. A petition for panel rehearing was denied January 26, 1998. The decision itself, press accounts of the decision, inquiries from the public, and discussions with Corps and EPA staff in the five states that comprise the Fourth Circuit all indicate the need for guidance regarding interpretation and implementation of that decision and restating the Corps' and EPA's longstanding interpretation of the regulations that describe CWA Section 404 jurisdiction over the various categories of waters of the United States.

b. The purpose of this memorandum is to explain the Wilson decision, to provide general guidance on the regulations concerning jurisdiction, and to provide specific guidance on jurisdiction applicable to the Fourth Circuit in light of Wilson. This guidance does not change the substantive requirements of existing Corps or EPA regulations, except to the extent necessary to comply with the decision of the Fourth Circuit Court of Appeals in the states comprising the Fourth Circuit. As described below, within the five states comprising the Fourth Circuit, the Corps and EPA will adhere to the holdings of law in the Wilson decision. At the same time, within the Fourth Circuit states, both the Corps and EPA will continue to assert CWA jurisdiction over any and all isolated water bodies, including isolated wetlands, based on the CWA statute itself, where (1) either agency can establish an actual link between that water body and interstate or foreign commerce and (2) individually and/or in the aggregate, the use, degradation or destruction of isolated waters with such a link would have a substantial effect on interstate or foreign commerce. This approach addresses the concerns of the Fourth Circuit regarding jurisdiction over these waters.

2. SCOPE OF THE DECISION

a. The three-judge panel of the Court of Appeals that decided the case produced three separate written opinions. In reading the decision, it is important to remember that the three-judge panel produced legally binding holdings of law regarding only three matters: (1) the "criminal intent" that a judge and/or jury must find in order to convict any person of a criminal violation of the CWA, (2) whether the provision of the Corps regulation defining CWA jurisdiction over "isolated" water bodies (i.e., 33 CFR 328.3(a)(3)) is authorized by the CWA, and (3) the admissibility of expert testimony on legal interpretations. The United States believes that the Fourth Circuit's holdings of law on the first two issues were incorrect, and we reserve the right

to litigate these issues in other circuits. The Fourth Circuit's decision in the Wilson case is not binding outside the Fourth Circuit, and therefore will not be implemented outside the Fourth Circuit (i.e., outside the states of Maryland, Virginia, West Virginia, North Carolina, and South Carolina). The first of the holdings of the Wilson decision (i.e., regarding "criminal intent") is primarily of concern to the U.S. Department of Justice (DOJ) whenever DOJ is considering whether, or how, to bring a criminal enforcement action under the CWA; the third holding relates to the conduct of trials. Neither of these issues will be discussed further in this memorandum. The focus of this memo is the issue of CWA jurisdiction.[1]

b. In addition to the three binding holdings of law noted above, two judges set out their views in conflicting, nonbinding discussions of two additional matters: (1) whether the CWA authorizes the United States to assert jurisdiction over "adjacent" wetlands even if those wetlands do not have a direct or indirect surface connection to other waters of the United States, and (2) whether the CWA authorizes the United States to assert CWA jurisdiction over the "sidecasting" of dredged material into waters of the United States during ditching or dredging activities in waters of the U.S. Because no binding decisions were reached on these matters, the Corps and EPA will continue to assert jurisdiction over adjacent wetlands and sidecasting activities consistent with our existing regulations and guidance. We believe that the opinion of Judge Payne, one of the judges on the panel, reflects a sound understanding of those regulations.

c. The Fourth Circuit's holding of law from Wilson that we must address is the following:

". . .we conclude that 33 CFR 328.3(a)(3) (1993) (defining waters of the United States to include those waters whose

degradation 'could affect' interstate commerce) is unauthorized by the Clean Water Act as limited by the Commerce clause and therefore is invalid. . . ." (Slip opinion, page 3).

Although the Corps and EPA strongly disagree with that holding, we must implement it throughout the Fourth Circuit unless and until it is overruled or clarified in the context of another court decision. Consequently, in the Fourth Circuit, neither the Corps nor the EPA will cite or rely upon 33 CFR 328.3(a)(3) as the basis for asserting CWA jurisdiction over any area, until further notice. Nevertheless, this change in operating procedures does not necessarily mean that either the Corps or the EPA will decline to assert jurisdiction over any aquatic area in the Fourth Circuit states, for the reasons explained below.

3. GENERAL GUIDANCE REGARDING CWA JURISDICTION

a. In the Federal Water Pollution Control Act Amendments of 1972, the Congress directed the Federal Executive Branch to assert jurisdiction over all waters of the United States subject to Federal constitutional authority (primarily the authority of the "Commerce Clause" of the U.S. Constitution). (See, e.g., Conference Report, S. Rep. No. 236, 92d Cong., 2d Sess. at 144, reprinted in U.S. Code Cong. & Admin. News, p. 3822 (1972).) When the EPA and the Corps assert CWA jurisdiction nationwide over all waters of the United States, including wetlands, we are carrying out that statutory mandate. The Federal Courts have consistently upheld, and, in fact, required, this broad assertion of Federal jurisdiction under the CWA. (See, e.g., NRDC v. Callaway, 392 F. Supp. 685 (D.D.C. 1975); United States v. Ashland Oil & Transportation Co., 504 F.2d 1317 (6th Cir. 1974); United States v. Byrd, 609 F. 2d 1204 (7th Cir 1979).)

b. The Corps of Engineers regulation at 33 CFR Part 328.3(a)

(2) is intended to interpret, explain, and implement the CWA's statutory mandate to assert jurisdiction over all "waters of the United States" subject to Federal constitutional authority. These regulations provide an interpretive definition of the term "waters of the United States" (i.e., those aquatic areas subject to Federal CWA jurisdiction), as follows:

1. First, paragraph (a)(1) defines the term "waters of the United States" to include all of the traditional navigable waters of the United States (i.e., "All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide").

2. In addition, paragraph (a)(2) defines "waters of the United States" to include: "All interstate waters including interstate wetlands".

3. The next paragraph, (a)(3), further defines "waters of the United States" to include all water bodies (including all wetlands) that are intrastate and isolated (i.e., that do not eventually drain or flow into traditional navigable waters or interstate waters), but which still have connections with interstate or foreign commerce, and are subject to Federal jurisdiction under the Commerce clause.

4. The next paragraph, (a)(4), further defines "waters of the United States" to include any impoundment of any water body otherwise defined as a water of the United States under any other paragraph in 33 CFR 328.3(a).

5. The next paragraph, (a)(5), further defines "waters of the United States" to include all tributaries of any water body identified as a water of the United States under paragraphs (1) through (4) of 33 CFR 328.3(a).

6. The next paragraph, (a)(6), further defines "waters of the United States" to include the territorial sea.

7. Finally, paragraph (a)(7) defines "waters of the United States" to include all wetlands adjacent to any water body defined as a water of the U.S. in paragraphs (a)(1) through (6).

c. It must be emphasized that 33 CFR 328.3(a)(3) applies only to, and should be cited only regarding, CWA jurisdiction over truly isolated water bodies (i.e., intrastate lakes, streams, prairie potholes, etc.) that have no connection with any tributary system that flows into traditional navigable waters or interstate waters. For any water body, including any wetland, that is part of, or flows into, or is a wetland adjacent to, a tributary system of traditional navigable waters or interstate waters, one should not cite 33 CFR 328.3(a)(3), but instead cite the relevant subsections of 33 CFR 328.3(a), such as subsection (a)(1) (covering traditional navigable waters); (a)(2) (covering interstate waters); (a)(5) (covering tributaries to navigable or interstate waters); and/or (a)(7) (covering adjacent wetlands). Of course, outside the Fourth Circuit, if the Corps and/or EPA determines that a water body is in fact isolated and intrastate, then 33 CFR 328.3(a)(3) may be cited as the basis for CWA jurisdiction. If there is a factual dispute over whether a water body is isolated, 33 CFR 328.3(a)(3) may be cited (outside the Fourth Circuit) as an alternative basis for jurisdiction with appropriate documentation included as to why it applies.

d. There are also two practical reasons why EPA and the Corps strongly prefer to assert and document CWA jurisdiction over an aquatic area as part of a tributary system to traditional navigable waters, or as wetlands adjacent to such a tributary system, rather than as an "isolated," intrastate water body under 33 CFR 328.3(a)(3). First, there is a more

conclusive body of case law supporting CWA jurisdiction over an aquatic area based on that area's status as part of, or wetlands adjacent to, a tributary system to traditional navigable waters, rather than as isolated waters. The U.S. Supreme Court, in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), and many lower Federal Courts in other cases, have clearly upheld Federal CWA jurisdiction over all tributaries to traditional navigable waters, and over wetlands adjacent to those tributaries, based on the fact that, for example, pollutants placed in such tributaries or their adjacent wetlands can migrate through the tributary system into traditional navigable waters, and that flood storage eliminated upstream can cause flooding in the downstream tributary system. These principles apply whether a portion of the tributary system is intermittent or perennial (See, e.g., Quivira Mining v. U.S. Environmental Protection Agency, 765 F. 2d 126 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986)). The Supreme Court has not yet directly addressed CWA jurisdiction over "isolated," intrastate water bodies that do not flow into tributaries to traditional navigable waters, although a number of lower federal courts have upheld federal CWA jurisdiction over isolated water bodies, including isolated wetlands. See, e.g., Hoffman Homes, Inc., v. EPA, 999 F.2d 256 (7th Cir. 1993); Leslie Salt Co. v. United States, 896 F. 2d 354 (9th Cir. 1990); Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995), cert. denied sub. nom. Cargill, Inc. v. United States, 116 S. Ct. 407 (1995); United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979); SWANCC v. U.S. Army Corps of Engineers, 1998 U.S. Dist. Lexis 3994 (N. Dist. Ill. 1998).

e. The second reason is a matter of ease of proof. When a water body is shown to be part of a tributary system to interstate or traditional navigable waters, that usually easily-established fact is sufficient to show that the water body can be regulated by the federal government under the commerce

clause. United States v. Ashland Oil and Transportation Corp., 504 F.2d 1317 (6th Cir. 1974). For isolated waters under 33 CFR 328.3(a)(3), each water body must have its own nexus with interstate commerce: that is, the use, degradation or destruction of the isolated water body could affect interstate commerce (e.g., the water body in question would support the hunting of migratory game birds or other animals, or the harvesting of timber or other products, or the trapping of fur-bearing animals, or is suitable habitat for migratory birds, etc.). Paragraph (a)(3) of the regulation sets out a non-exclusive list of ways an isolated water body could have the necessary commerce connection. Additional examples are set out in preamble language (51 Fed. Reg. 41,217 (Nov. 13, 1986), 53 Fed. Reg. 20,765 (June 6, 1988)). This preamble discussion reflects a September 12, 1985, memorandum by the General Counsel of EPA explaining and asserting Clean Water Act jurisdiction over isolated waters based on their use by migratory birds and federally listed endangered or threatened species. Of course, for a particular "isolated," intrastate water body, Corps or EPA field staff may be able to document only some relatively small-scale connections between that water body and interstate and foreign commerce (e.g., that the isolated water body serves as habitat for migratory birds). Nevertheless, EPA and the Corps believe, and if necessary will demonstrate, that each of these classes of interstate commerce-related activities associated with isolated waters (e.g., migratory bird usage of isolated waters), taken as a whole or in the aggregate, has a substantial effect on interstate or foreign commerce, as required by United States v. Lopez, 514 U.S. 549, 1995.

4. GUIDANCE SPECIFIC TO THE FOURTH CIRCUIT

a. The remainder of this guidance addresses assertion of jurisdiction over isolated waters within the Fourth Circuit until further notice. Although the written opinion in the Wilson case

regarding 33 CFR 328.3(a)(3) is not entirely clear, it appears that the Court's fundamental objection to that provision of the Corps' regulation is that, by its terms, 33 CFR 328.3(a)(3) asserts CWA jurisdiction over isolated water bodies based on their potential, as opposed to actual, connections with interstate or foreign commerce. The court seemed concerned that this language fell short of the "substantial effect test." Consequently, the court declared that 328.3(a)(3) was invalid because it exceeded Congressional intent.

b. As stated above, while the Corps and EPA believe that the court's decision regarding the legality of the Corps' jurisdictional regulation is wrong, we will fully comply with and implement the Fourth Circuit's holding in the Wilson case (within the states constituting the Fourth Circuit) so long as it represents the controlling law on this point within the Fourth Circuit. Consequently, until further notice, neither the Corps nor the EPA will cite or rely upon the regulatory provision of 33 CFR 328.3(a)(3) as a basis for asserting CWA jurisdiction over any area for any purpose within the Fourth Circuit. Similarly, within the five states comprising the Fourth Circuit, neither the Corps nor the EPA will assert CWA jurisdiction over any isolated, intrastate water body where the only basis that the Government can establish for such jurisdiction would be potential effects on interstate or foreign commerce.

c. Nevertheless, both the Corps and EPA will continue to assert CWA jurisdiction over any and all isolated water bodies, including isolated wetlands, within the Fourth Circuit, based on the CWA statute itself, where (1) either agency can establish an actual link between that water body and interstate or foreign commerce, and (2) individually and/or in the aggregate, the use, degradation or destruction of isolated waters with such a link would have a substantial effect on interstate or foreign commerce. Those actual connections with and effects on interstate or foreign commerce may include all

of the types of actual effects on interstate or foreign commerce that the Corps and EPA have traditionally relied on: for example, use for recreation by interstate or foreign travelers; use for taking fish or shellfish sold in interstate or foreign commerce; use by industries operating in interstate or foreign commerce; use by migratory waterfowl, other game birds, or other migratory birds that are sought by hunters, birdwatchers, or photographers, or are protected by international treaty, thereby affecting interstate commerce[3]; or use by federally listed endangered or threatened species. Corps and EPA headquarters will be compiling information on the aggregate effects of various activities on interstate commerce, so that, as the need arises, the Corps and EPA can document that, in the aggregate, the use, degradation, or destruction of isolated water bodies would have substantial effects on interstate or foreign commerce. Existing case law will assist this endeavor (e.g., for migratory birds see Hoffman Homes, 961 F.2d 1310 (7th Cir. 1992); for interstate travelers see Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979); for endangered species, Palila, 471 F. Supp. 985, 991-995 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981), and National Association of Homebuilders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997)).

d. Corps and EPA field offices within the Fourth Circuit should make it clear to members of the regulated public that both agencies will still assert jurisdiction over isolated water bodies, including isolated wetlands, on a case-by-case basis within the Fourth Circuit states, based on the CWA statute itself, where there is an actual connection between such water bodies and interstate or foreign commerce, and the effect on such commerce, individually and/or in the aggregate, is substantial. The Corps and EPA will work to minimize any delays or inconveniences to the regulated public that might attend the establishment of the actual connections with interstate or foreign commerce for individual isolated water bodies.

e. Previously issued Section 404 permits authorizing discharges into isolated waters in the Fourth Circuit remain in effect as issued. The Corps and the EPA do not believe that the Fourth Circuit's decision in the Wilson case requires the Corps to modify such previously issued permits or to delete permit conditions requiring compensatory mitigation for activities in isolated water bodies, or to delete other permit conditions relating to such waterbodies. Moreover, to the extent that jurisdiction over isolated waters is established as identified above, no modifications to existing practice for normal compensatory mitigation or other permit conditions are necessary for permits issued in the future for activities in isolated water bodies.

5. FURTHER INFORMATION

a. In the near future, EPA and the Corps intend to promulgate a rule addressing the jurisdictional issues discussed in this guidance, with full opportunity for public review and comment.

b. If you have any questions regarding this guidance memorandum, please contact your local EPA Regional Office or Corps District Office. For EPA Headquarters, please call John Goodin at (202) 260-9910. For Corps Headquarters, contact Sam Collinson at (202) 761-0199.

Robert W. Wayland, III /s/ 5/29/98

Director, Office of Wetlands, Oceans, and Watersheds

Office of Water

U.S. Environmental Protection Agency

FOR THE COMMANDER:

Charles M. Hess /s/ 5/29/98

Chief, Operations, Construction, and
Readiness Division

Directorate of Civil Works

U.S. Army Corps of Engineers

1. The issue addressed by the court's opinion was whether the wetlands in question were jurisdictional, not how to determine whether an area is a wetland.

2. EPA's regulations contain equivalent (although not verbatim) definitions; the two agencies' regulations cover the same waters. For convenience, this discussion refers to the Corps' regulations.

3. Although Tabb Lakes, Ltd. v. United States, (715 F. Supp. 726, aff'd without opinion, 885 F.2d 866 (4th Cir., 1989)), concluded that EPA/Corps guidance could not be cited as the legal basis for interstate commerce nexus using migratory birds because that guidance had been issued without notice and comment, the decision did not prohibit the use of migratory birds to establish a connection to interstate commerce under the Clean Water Act. Consequently, notwithstanding the Fourth Circuit's decision in Tabb Lakes, Corps and EPA field offices should continue to assert CWA jurisdiction over all isolated, intrastate water bodies that serve as habitat for migratory birds.